

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CYNTHIA KENDRICK, individually,
and as successor in interest to her now
deceased husband, GARY KENDRICK,

Plaintiff,

V.

COUNTY OF SAN DIEGO; SAN DIEGO COUNTY SHERIFF'S DEPARTMENT; San Diego Sheriff WILLIAM GORE; San Diego Sheriff's Deputy STEVEN BLOCK; and DOES 1 through 50,

Defendants.

Case No.: 15cv2615-GPC(AGS)[Title]

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

[Dkt. No. 70.]

Before the Court is Defendants' motion for summary judgment on all causes of action against them alleged in the second amended complaint. (Dkt. No. 70.) Plaintiff filed an opposition on January 19, 2018. (Dkt. No. 75.) Defendants filed a reply on February 16, 2018. (Dkt. No. 79.) After a review of the briefs, the supporting documentation, and the applicable law, the Court GRANTS in part and DENIES in part Defendants' motion for summary judgment.

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Background

2 On November 20, 2015, Plaintiff Cynthia Kendrick (“Plaintiff” or “Cynthia”), in
3 her individual capacity and as successor in interest to her deceased husband Gary
4 Kendrick (“Gary”) filed a complaint alleging numerous causes of action arising out of the
5 shooting death of Gary by a Sheriff’s Deputy of the San Diego County Sheriff’s
6 Department. (Dkt. No. 1.) On June 23, 2017, Plaintiff filed the operative second
7 amended complaint (“SAC”) against Defendants County of San Diego, Sheriff William
8 Gore, Lieutenant Amy Brown-Lisk, Detective Troy Dugal, Detective Daniel Barnes,
9 Detective Matthew Mays, Detective Dave Hillen, Sergeant Dustin Lopez, Deputy Steven
10 Block, Deputy Jeremy Collis, Deputy Kevin Norie and Deputy Jason Worthington. (Dkt.
11 No. 61.) She alleges the following causes of action: (1) 42 U.S.C. § 1983 - excessive
12 force by Gary’s Successor against the County and Deputy Block; (2) Monell claim by
13 Gary’s Successor against the County; (3) battery by Gary’s Successor against the County
14 and Deputy Block; (4) California Civil Code section 52.1 by Gary’s Successor against the
15 County and Deputy Block, (5) negligence by Gary’s Successor against the County and
16 Deputy Block; (6) negligent hiring, retention and supervision by Gary’s Successor
17 against Sheriff Gore; (7) wrongful death by Plaintiff as to all Defendants; (8) 42 U.S.C. §
18 1983 – substantive due process by Plaintiff against all Defendants;¹ (9) 42 U.S.C. § 1983
19 - unreasonable seizure by Plaintiff against Defendants Lieutenant Brown-Lisk, Detective
20 Barnes, Detective Hillen, Sergeant Lopez, Deputy Norie, Deputy Collis and Deputy
21 Worthington; and (10) 42 U.S.C. § 1983 - unreasonable search by Plaintiff against
22 Detectives DuGal and Mays. (Id.)

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27 ¹ Plaintiff does not object to the voluntary dismissal of the substantive due process-claims for
28 interference with familial relations. (Dkt. No. 75 at 13 n. 9.) Accordingly, the Court GRANTS
Defendants' motion for summary judgment on the eighth cause of action as unopposed.

Factual Background

2 On March 27, 2015, at 9:26 a.m., the Sheriff's Department received a 9-1-1 call
3 from a phone number that corresponded to 2014 Shadytree Lane in Encinitas. (Dkt. No.
4 75-9, P's Response to Ds' SSUF, No. 1.) Nothing was heard during the call. (Id.)
5 Deputy Norie arrived near 2015 Shadytree Lane in Encinitas at 9:34 a.m. (Id., No. 2.)
6 While driving to that location, Deputy Block heard Deputy Norie's radio transmission
7 that a male with a shotgun said he would shoot someone, or would kill himself. (Id.; Dkt.
8 No. 70-6, Ds' NOL, Ex. C, Radio Traffic at 6.) However, Deputy Block did not hear the
9 other radio transmissions because his vehicle's radio transmission had been giving him
10 problems. (Dkt. No. 75-1 McBride Decl., Ex. F, Block Depo. at 40:1-41:23.) He
11 testified he was not sure if he missed any other radio calls as he was en route to Shadytree
12 Lane. (Id. at 41:15-23.) According to the radio call transcript, Sheriff deputies were at
13 the residence on Monday as Gary was throwing his property outside the house. (Dkt. No.
14 70-6, Ds' NOL, Ex. C, Radio Traffic at 8.) The transcript also indicated that based on the
15 previous incident's call on March 24th there were numerous weapons in the house that
16 should be in a safe, that Gary was upset, throwing things around the house, possibly
17 owned 15 guns and kept a shotgun under his bed. (Id.)

18 Deputy Block arrived at the scene at around 9:39 a.m. (Dkt. No. 79-2, Ds'
19 Response to P's Add'l Facts, No. 49.) When Deputy Block arrived, he got out of his
20 vehicle wearing two ballistic vests, took an AR-15 with him, and charged his rifle while
21 walking towards Deputy Norie who was talking with a man. (Dkt. No. 75-1, McBride
22 Decl., Ex. F, Block Depo. at 50:25-51:15; 70:5-18.) As he walked past Deputy Norie,
23 Deputy Block asked him for the location of the residence. (*Id.* at 72:1-73:2; 74:14-25;
24 Dkt. No. 75-1, McBride Decl., Ex. E, Norie Depo. at 57:7-11; 58:21-59:5.) Deputy Norie
25 pointed down in the north direction and said it was around the corner. (Dkt. No. 75-1,
26 McBride Decl., Ex. F, Block Depo. at 72:25-73:3; Dkt. No. 75-1, McBride Decl., Ex. E,
27 Norie Depo. at 59:1-6.)

1 Deputy Block testified he did not know anything about Gary at the time of the
2 incident but earlier in the week, on Wednesday, he had been briefed about the incident on
3 March 24th at a meeting. (Dkt. No. 75-1, McBride Decl., Ex. F, Block Depo. at 63:3-
4 64:11.) At the meeting, Deputy Block learned that deputies responded to a domestic
5 disturbance call on Monday where the husband was throwing items of clothing outside
6 the home because he had caught the wife having an extramarital affair inside the home
7 and it was noted that there were multiple guns on the property. (Id.)

8 Deputy Block arrived at the corner of a row of garages and saw a male, who later
9 was identified as Gary, sitting in the grass. (Dkt. No. 70-5, Ds' NOL, Ex. B, Block Depo.
10 at 93:9-23.) At 9:41 a.m., plus 7 seconds, Deputy Block saw Gary on the grass leaning
11 backwards with a shotgun in his left hand with a barrel pointed upwards near his face.
12 (Id. at 95:10-20; 103:5-10; 104:7-13.) When Gary heard Deputy Block “key up [his]
13 radio”, he jumped up and rose to his feet. (Id. at 106:18-107:6.) Deputy Block
14 commanded the man to stay where he was and to put the gun down. (Id. at 112:6-113:20;
15 121:10-21.) The man was also yelling at the same time to shoot him. (Id. at 112:12-
16 113:5.)

17 Then, as Gary began to step towards Deputy Block and the barrel starting swinging
18 towards Block as Gary’s right hand started moving towards the pistol grip of the shotgun,
19 Deputy Block shot at Gary with three shots. (Dkt. No. 70-5, Ds' NOL, Ex. B, Block
20 Depo. at 128:10-22; 140:8-22.) When Gary was shot, he was already committed to going
21 into a shooting stance. (Id. at 135:23-136:6.) Two of the shots struck an exterior of a
22 residence and another penetrated the wall, went through a bed, went through a closet and
23 rested in a hallway. (Dkt. No. 75-1, McBride Decl., Ex. F at 193:15-25.)

24 Deputy Block testified he began shooting “maybe two minutes” upon arriving on
25 the scene. (Dkt. No. 75-1, McBride Decl., Ex. F at 141:2-12.) About five or six seconds
26 passed from when he arrived at the corner and his first shot. (Id. at 141:13-19.)

1 Cynthia Kendrick, the only other witness to the incident, presents different facts
2 than testified to by Deputy Block. Cynthia states that Gary never took a “shooter’s
3 stance” when confronted by Block. (Dkt. No. 75-2, Kendrick Decl. ¶ 12.) Instead, when
4 Deputy Block began firing, Gary was facing Deputy Block, standing in a cross pose, with
5 his arms outstretched and near parallel with the ground holding a bottle of vodka in his
6 right hand and the barrel of the shotgun in his left hand.² (Id. ¶ 13.) Cindy states her
7 husband did not swing or aim the shotgun towards Block and never had his hand near the
8 trigger of the shotgun. (Id. ¶ 14.) The only motion he might have made was dropping the
9 vodka bottle before Deputy Block starting shooting. (Id.) Her husband did not lower his
10 arms from a parallel position before Deputy Block began shooting. (Id.) When Gary was
11 shot, the shotgun flew from his right hand and away from the body and he never regained
12 possession of the shotgun before he died. (Id. ¶ 15.)

13 According to Deputy Block, Gary was still standing after the first shot and fell
14 backwards after the third shot. (Dkt. No. 70-5, Ds’ NOL, Ex. B, Block Depo. at 137:20-
15 138:2.) As he lay on his back, his left arm was outstretched, and he still had the shotgun
16 “kind of across his forearm and onto his left hand.” (Id. at 144:3-10.) Deputy Block fell
17 on his knees for a short second after being in shock at what had happened. (Id. at 145:19-
18 24.) Then Deputy Block saw Gary sit up quickly with the shotgun in his hand and began
19 turning his body to put it in a seated shooting position and moving his right hand towards
20 the pistol grip and then Block got back up and fired his fourth shot. (Id. at 153:5-154:5;
21 155:8-22; 159:3-16.) Then Gary fell forward with his face down, halfway between being
22 fully on his side and fully on his stomach with his butt a little in the air and legs bent and
23 with left hand cradling over the top of his shotgun. (Id. at 160:11-162:22.)

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26 ² Cynthia’s declaration includes conflicting facts concerning which hand was holding the shotgun and
27 the liquor bottle. Paragraph 13 states that Gary was holding a bottle of vodka in his right hand and the
28 barrel of the shotgun in his left hand while paragraph 8 states that Gary was holding the barrel of the
shotgun with his right hand and a bottle of vodka in his left hand. (Dkt. No. 75-2, Kendrick Decl. ¶¶ 8,
13.)

1 Mr. Kendrick's blood alcohol content was measured at .28% after the shooting
2 which is more than three times the legal limit to drive. (Dkt. No. 79-2, Ds' Response to
3 P's Add'l Facts, No. 51.) At 9:45 a.m., deputies approached Gary and at 9:46 a.m. fire
4 department medical personnel approached him. (Dkt. No. 79-1, P's Response to Ds'
5 SSUF, No. 13.)

6 **B. Facts as to Cindy Kendrick**

7 After the fourth shot, Cynthia ran towards Gary's body but Deputies Norie and
8 Block yelled at her to get back and she complied. (Dkt. No. 70-5, Ds' NOL, Ex. B,
9 Block Depo. at 162:6-22.) But then a few seconds later she ran again towards Gary again
10 and the deputies told her to "Get back." (Id.) The second time, she hugged or cradled
11 Gary or held on to his body for about two seconds. (Id. at 166:15-167:8.)

12 Deputy Norie and another deputy escorted Cynthia away from the scene. (Dkt.
13 No. 75-2, Kendrick Decl. ¶ 18.) When Deputy Collis appeared on the scene he saw
14 Deputy Norie standing and Cynthia sitting on the ground, visibly upset. (Dkt. No. 70-8,
15 Ds' NOL, Ex. E, Collis Depo. at 29:6-21.) Deputy Collis thought they should move her
16 away from the people gathering to a more comfortable location. (Id. at 31:1-9.)

17 Deputy Norie walked her to a patrol vehicle and put her in the back seat, closed the
18 door and walked away. (Id. at 37:3-5.) The patrol vehicle's rear door could not be
19 unlocked from the inside when closed so after a few minutes, Deputy Collis noticed that
20 the doors were closed, he opened the door back up to make sure she had air. (Id. at 37:4-
21 10; 39:22-40:6.) In fact, a neighbor asked Deputy Collis if he could roll the windows
22 down for Cynthia. (Id. at 40:23-25.) In contrast, Cynthia states when she was put in the
23 patrol vehicle, she requested to get fresh air but Deputies Norie and Collis ignored her
24 requests and were not present for most of the time and door was not open. (Dkt. No. 75-
25 2, Kendrick Decl. ¶ 18.)

26 Around 10:08 am, Sergeant Lopez directed Deputy Collis to drive Deputy Norie
27 and Cynthia to the station together. (Dkt. No. 79-2, Ds' Response to P's Add'l Facts, No.
28 75.) At the station, Lieutenant Brown-Lisk directed Deputy Worthington to be with

1 Cynthia until homicide detectives could interview her. (Dkt. No. 75-1, McBride Decl.,
2 Ex. J, Brown-Lisk Depo. at 37:1-6.) Deputy Worthington took custody of Cynthia until
3 he transferred custody to Detectives Barnes and Hillen at 1:00 p.m. (Dkt. No. 75-1,
4 McBride Decl., Ex. I, Worthington Depo. at 53:20-23.) The detectives interviewed
5 Cynthia and photographed her and she did not leave the station until around 4:30 p.m.
6 (Dkt. No. 75-2, Kendrick Decl. ¶ 26.)

7 **C. Search Warrant**

8 Detective Mays wrote the search warrant and assisted in the search. (Dkt. No. 75-
9 9, P's Response to Ds' SSUF, No. 32.) Detective DuGal instructed Mays to request the
10 search warrant of the Kendrick residence, two nearby residences struck by bullets, Gary
11 Kendrick's car, his garage, trash cans and outbuildings. (Id., No. 33.) After Judge
12 Bowman issued the search warrant, Detective Mays informed Detective DuGal by phone
13 and drove to the Kendrick residence around 4:35 p.m. and the search was completed
14 about 9:00 p.m. (Id., No. 36.) Cynthia was allowed to return to her residence around
15 10:00 p.m. (Dkt. No. 79-2, Ds' Response to P's SSUF No. 90.)

16 **Discussion**

17 **A. Legal Standard on Motion for Summary Judgment**

18 Federal Rule of Civil Procedure 56 empowers the Court to enter summary
19 judgment on factually unsupported claims or defenses, and thereby "secure the just,
20 speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477
21 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings,
22 depositions, answers to interrogatories, and admissions on file, together with the
23 affidavits, if any, show that there is no genuine issue as to any material fact and that the
24 moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is
25 material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477
26 U.S. 242, 248 (1986).

27 The moving party bears the initial burden of demonstrating the absence of any
28 genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving party can

1 satisfy this burden by demonstrating that the nonmoving party failed to make a showing
2 sufficient to establish an element of his or her claim on which that party will bear the
3 burden of proof at trial. Id. at 322-23. If the moving party fails to bear the initial burden,
4 summary judgment must be denied and the court need not consider the nonmoving
5 party's evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

6 Once the moving party has satisfied this burden, the nonmoving party cannot rest
7 on the mere allegations or denials of his pleading, but must "go beyond the pleadings and
8 by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions
9 on file' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex,
10 477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an
11 element of its case, the moving party is entitled to judgment as a matter of law. Id. at
12 325. "Where the record taken as a whole could not lead a rational trier of fact to find for
13 the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v.
14 Zenith Radio Corp., 475 U.S. 574, 587 (1986). In making this determination, the court
15 must "view[] the evidence in the light most favorable to the nonmoving party." Fontana
16 v. Haskin, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility
17 determinations, weighing of evidence, or drawing of legitimate inferences from the facts;
18 these functions are for the trier of fact. Anderson, 477 U.S. at 255.

19 **B. First Cause of Action – 42 U.S.C. § 1983 - Excessive Force**

20 Plaintiff alleges an excessive force claim against the County³ and Deputy Block
21 alleging Deputy Block unnecessarily escalated the situation upon arrival and used
22 unreasonable and excessive force by shooting Gary multiple times with an assault rifle
23 even though he did not pose an immediate threat to those present. (Dkt. No. 61, SAC ¶
24 74.)

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28 ³ Defendants argue that the County cannot be liable on a claim of excessive force because there is no
respondeat superior liability under § 1983. Plaintiff does not address this issue. Because there is no
respondeat superior under § 1983, the Court GRANTS Defendants' motion for summary judgment as to
the County. See Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978).

1 In their motion, Defendants argues that Deputy Block cannot be liable for
2 excessive force because Gary posed an immediate danger to him and others by engaging
3 into a “shooter’s stance.” Plaintiff argues there are disputed issues of material fact
4 whether Gary engaged into a “shooter’s stance” when he was shot.

5 Section 1983 provides a plaintiff with a cause of action when a person acting under
6 the color of state law deprives them of any federal constitutional right. 42 U.S.C. § 1983.
7 “[A]prehension by the use of deadly force is a seizure subject to the reasonableness
8 requirement of the Fourth Amendment.” Tennessee v. Garner, 471 U.S. 1, 7 (1985). An
9 excessive force claim in the course of a law enforcement’s “seizure” is analyzed under
10 the Fourth Amendment’s “objective reasonableness” standard. Graham v. Connor, 490
11 U.S. 386, 388 (1989). Objective reasonableness is determined “in light of the facts and
12 circumstances confronting them, without regard to their underlying intent or motivation.”
13 Id. at 397. “The “reasonableness” of a particular use of force must be judged from the
14 perspective of a reasonable officer on the scene, rather than with the 20/20 vision of
15 hindsight. Id. at 396. Use of lethal force is justified if there is “probable cause to believe
16 that the suspect poses a threat of serious physical harm, either to the officer or to others.”
17 Garner, 471 U.S. at 11. “Thus, if the suspect threatens the officer with a weapon or there
18 is probable cause to believe that he has committed a crime involving the infliction or
19 threatened infliction of serious physical harm, deadly force may be used if necessary to
20 prevent escape, and if, where feasible, some warning has been given.” Id. at 11-12.

21 In sum, an officer’s use of deadly force is reasonable only if “the officer has
22 probable cause to believe that the suspect poses a significant threat of death or serious
23 physical injury to the officer or others.” Garner, 471 U.S. at 3; Scott v. Harris, 550 U.S.
24 372, 383 (2007). Reasonableness of a seizure is determined by balancing the “nature and
25 quality of the intrusion on the individual’s Fourth Amendment interests against the
26 importance of the governmental interests alleged to justify the intrusion.” United States v.
27 Place, 462 U.S. 696, 703 (1983). The “standard requires us to balance the amount of
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1 force applied against the need for that force.” Deorle v. Rutherford, 272 F.3d 1272, 1279
2 (9th Cir. 2001).

3 The Ninth Circuit has enunciated a three step analysis in determining whether a
4 seizure is objectively reasonable. “First, we must assess the severity of the intrusion on
5 the individual’s Fourth Amendment rights by evaluating ‘the type and amount of force
6 inflicted.’” Glenn v. Washington Cnty., 673 F.3d 864, 871 (9th Cir. 2011) (citations
7 omitted). Second, “we evaluate the government’s interest in the use of force.” Id.
8 (citation omitted). Finally, “we balance the gravity of the intrusion on the individual
9 against the government’s need for that intrusion.” Id. (citation omitted).

10 Here, Gary was shot and killed by a rifle which constitutes a severe intrusion on
11 his Fourth Amendment rights. See Garner, 471 U.S. at 9 (“The intrusiveness of a seizure
12 by means of deadly force is unmatched.”). Next, the government’s interest in the force
13 used is determined by assessing (1) the severity of the crime at issue, (2) whether the
14 suspect posed an immediate threat to the safety of the officers or others, and (3) whether
15 the suspect actively resisted arrest or attempted to escape. Id. (citing Graham, 490 U.S. at
16 396). Courts may also consider other relevant factors such as “the availability of less
17 intrusive alternatives to the force employed, whether proper warnings were given and
18 whether it should have been apparent to officers that the person they used force against
19 was emotionally disturbed.” Id. at 872.

20 “Because [the excessive force inquiry] nearly always requires a jury to sift through
21 factual contentions, and to draw inferences therefrom, we have held on many occasions
22 that summary judgment or judgment as a matter of law in excessive force cases should be
23 granted sparingly.” Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002); see also Torres v.
24 City of Madera, 648 F.3d 1119, 1125 (9th Cir. 2011); Smith v. City of Hemet, 396 F.3d
25 689, 701 (9th Cir. 2005).

26 Here, the facts are clearly disputed as to Gary’s physical position right before
27 Deputy Block shot him by the two witnesses to the shooting. On one hand, Defendant
28 Deputy Block testified that Gary initially had his shotgun barrel pointed upwards near his

1 face and when he heard Deputy Block, he stood up and then started to swing the barrel of
2 the shotgun towards Deputy Block and his hand began moving towards the pistol grip of
3 the shotgun. As Gary moved into a “shooter’s stance”, Deputy Block shot him three
4 times. Then after Gary fell backwards, he quickly sat back up and started moving into a
5 seated shooting position when Block fired the final, fatal shot. Therefore, according to
6 Deputy Block, he reasonably perceived an immediate threat to his safety as well as to
7 others. On the other hand, Cynthia declares that when Gary left the back yard, his arms
8 were outstretched with the shotgun in his right hand and a large partly empty plastic
9 bottle of vodka in his left hand. (Dkt. No. 75-2, Kendrick Decl. ¶ 8.) When Deputy
10 Block got the attention of Gary, they both started yelling at each other and within
11 seconds, Deputy Block fired his gun. (Id. ¶¶ 10, 11.) When Deputy Block began
12 shooting, Gary was standing in a cross pose, with his arms outstretched and near parallel
13 to the ground. (Id. ¶ 13.) She states that Gary never swung his arms or aimed the
14 shotgun towards Deputy Block and did not take a “shooter’s stance.” (Id. ¶ 14.) Gary
15 might have dropped the vodka bottle before Deputy Block began firing. (Id.) According
16 to Cynthia, the shooting caused the shotgun to fly from her husband’s right hand and
17 away from the body and he never regained possession of the shotgun before he died. (Id.
18 ¶ 15.) She claims Gary did not pose a significant threat of serious physical injury to
19 anyone. A disputed issue of material facts exists as to whether Gary posed an
20 “immediate threat to the safety of the officers or others.”

21 Moreover, Defendants have not asserted that Gary had committed a crime or that
22 he was actively resisting arrest or trying to evade arrest by fleeing. See Garner, 471 U.S.
23 at 9. Here, the only witnesses to the shooting were Deputy Block and Cynthia Kendrick
24 and both tell starkly different accounts of what happened. As such, Plaintiff has raised a
25 genuine issue of material fact as to whether there was probable cause that Gary posed a
26 significant threat of death or serious physical injury to Deputy Block or others. See
27 Garner, 471 U.S. at 3, 11. The Court DENIES Defendants’ motion for summary
28 judgment on the excessive force claim.

1 **C. Second Cause of Action - Monell Claim**

2 The SAC alleges that the County is liable for an unconstitutional practice or
3 custom of using excessive and unreasonable force on “individuals in the midst of a
4 mental health crisis” and also for its failure to train deputies to appropriately deal with
5 such individuals. (Dkt. No. 61, SAC ¶ 80.) In their motion, Defendants contend that
6 Plaintiff cannot demonstrate a disputed issue of material fact that the County had an
7 unconstitutional policy and whether it failed to train its officers.⁴ Plaintiff opposes
8 arguing that she has demonstrated an issue of fact whether the County failed to train its
9 employees adequately.⁵ The County’s failure to train its law enforcement officers to deal
10 with mentally disturbed individuals without violating their constitutional rights reveals
11 deliberate indifference on the part of the County, Sheriff Gore, and its policy makers and
12 the failure to train was a substantial factor in causing Gary’s death.

13 Cities, counties and other local government entities are subject to claims under 42
14 U.S.C. § 1983. Monell v. New York City Dep’t of Social Servs., 436 U.S. 658 (1978).
15 While municipalities, their agencies and their supervisory personnel cannot be held liable
16 under § 1983 on any theory of respondeat superior or vicarious liability, they can,
17 however, be held liable for deprivations of constitutional rights resulting from their
18 formal policies or customs. Id. at 691-93. Liability only attaches where the municipality
19 itself causes the constitutional violation through “execution of a government’s policy or
20 custom, whether made by its lawmakers or by those whose edicts or acts may fairly be
21 said to represent official policy.” Id. at 694. Plaintiffs must establish that “the local
22 government had a deliberate policy, custom, or practice that was the moving force behind
23 the constitutional violation [they] suffered.” AE ex rel. Hernandez v. Cnty. of Tulare,

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26 ⁴ While Defendants assert there are two separate issues in the Monell claim, they only address the failure
27 to train theory of liability.
28 ⁵ While the SAC also alleges a separate claim that the County had an unconstitutional policy, or custom,
it is not clear whether Plaintiff is asserting a separate Monell claim based on an unconstitutional policy
or custom separate from the failure to train.

1 666 F.3d 631, 636 (9th Cir. 2012) (citing Whitaker v. Garcetti, 486 F.3d 572, 581 (9th
2 Cir. 2007)).

3 The Supreme Court has, in limited circumstance, held that “the inadequacy of
4 police training may serve as the basis for § 1983 liability only where the failure to train
5 amounts to deliberate indifference to the rights of persons with whom the police come
6 into contact.” City of Canton v. Harris, 489 U.S. 378, 388 (1989) (“Only where a
7 municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate
8 indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of
9 as a city ‘policy or custom’ that is actionable under § 1983.”). A section 1983 plaintiff
10 alleging a policy of failure to train peace officers must show: (1) he/she was deprived of a
11 constitutional right; (2) the local government entity had a training policy that amounts to
12 deliberate indifference to constitutional rights of persons with whom its peace officers are
13 likely to come into contact; and (3) his/her constitutional injury would have been avoided
14 had the local government unit properly trained those officers. Blankenhorn v. City of
15 Orange, 485 F.3d 463, 484 (9th Cir. 2007). The standard “must demonstrate a
16 ‘conscious’ or ‘deliberate’ choice on the part of a municipality in order to prevail on a
17 failure to train claim.” Flores v. Cnty. of Los Angeles, 758 F.3d 1154, 1158 (9th Cir.
18 2014). Mere negligence in training or supervision, however, does not give rise to a
19 Monell claim. Dougherty v. City of Corvina, 654 F.3d 892, 900 (9th Cir. 2011).
20 Deliberate indifference is a stringent standard that a municipal actor “disregarded a
21 known or obvious consequence of his action”, and can be demonstrated when “city
22 policymakers are on actual or constructive notice that a particular omission in their
23 training program causes city employees to violate citizens’ constitutional rights”
24 Connick v. Thompson, 563 U.S. 51, 61 (2011).

25 Typically, a plaintiff must demonstrate a pattern of similar constitutional violations
26 to demonstrate deliberate indifference. Id. at 62. However, the U.S. Supreme Court left
27 open the possibility of a “single incident” liability under a Monell claim in City of
28 Canton, 489 U.S. at 390 n.10. In such a case, “it may happen that in light of the duties

1 assigned to specific officers or employees the need for more or different training is so
2 obvious, and the inadequacy so likely to result in the violation of constitutional rights,
3 that the policymakers of the city can reasonably be said to have been deliberately
4 indifferent to the need.” Id. at 390. “In resolving the issue of a city’s liability, the focus
5 must be on adequacy of the training program in relation to the tasks the particular officers
6 must perform.” Id.; Bd. of Comm’rs of Bryan Cnty. v. Brown, 520 U.S. 397, 409 (1997)
7 (recognizing “single incident” liability). “A plaintiff [] might succeed in proving a
8 failure-to-train claim without showing a pattern of constitutional violations where ‘a
9 violation of federal rights may be a highly predictable consequence of a failure to equip
10 law enforcement officers with specific tools to handle recurring situations.’” Long v.
11 Cnty. of Los Angeles, 442 F.3d 1178, 1186 (9th Cir. 2006).

12 In their motion, Defendants summarily argue that Plaintiff cannot demonstrate
13 deliberate indifference or a direct causal link between the failure to train and the alleged
14 constitutional violation. Plaintiff responds that she has submitted evidence that the
15 deputies receive little training in handling individuals with mental health issues. The
16 failure to train evinces deliberate indifference to the likelihood that the deputies will
17 violate the constitutional rights of individuals who appear mentally disturbed. Although
18 not articulated, it appears that Plaintiff is pursuing a theory of single incident liability
19 under Monell as she has not provided any evidence of a pattern of similar constitutional
20 violations.

21 Deputy Block testified that he took a class or had some training in dealing with
22 people with mental disabilities in the academy. (Dkt. No. 75-1, McBride Decl., Ex. F,
23 Block Depo. at 196:16-23.) He also took a one day, eight-hour Psychiatric Emergency
24 Response Team (“PERT”) class, in February 2014, where the class addressed the
25 different types of mental disabilities but did not teach how officers are to handle
26 situations where someone is suffering from mental health issues. (Id. at 197:2-198:5.)
27 When asked whether the Sheriff’s Department trains officers on how to approach an
28 individual that is potentially mentally disturbed, Deputy Block responded that the

1 approach is the same as “any other pedestrian contact.” (Id. at 219:6-16.) Deputy Block
2 testified that he did not receive training on how to handle situations involving “suicide by
3 cop” where an individual acts aggressively towards police officers in order to get the
4 police officer to shoot him or her because the individual does not want to commit suicide.
5 (Id. at 234:19-235:22.)

6 Deputy Lewis Norman-Hendersen, not a defendant, is a PERT deputy who has
7 primary responsibility for all calls involving mental health. (Dkt. No. 75-1, McBride
8 Decl., Ex. B, Norman-Hendersen Depo. at 32:5-12.) He attended a three-day PERT
9 academy training and possibly some quarterly trainings. (Dkt. No. 75-1, Ex. D, Davies
10 Depo. at 28:3-21.)

11 District courts have held that lack of any training or policies on how to handle
12 mentally unstable individuals during the course of an officer’s work creates a triable issue
13 of fact whether such lack of training amounts to deliberate indifference. Kirby v. City of
14 East Wenatchee, No. CV12-190-JLQ, 2013 WL 1497343, at *13 (E.D. Wash. Apr. 10,
15 2013) (denying summary judgment on Monell claim as there was a complete absence of
16 any policy or training in handling with persons in a mental health crisis); Newman v. San
17 Jaoquin Delta Comm. College Dist., 814 F. Supp. 2d 967, 978 (E.D. Cal. 2011) (despite
18 plaintiffs’ weak evidence to demonstrate failure to train theory, in drawing all inference
19 in the plaintiffs’ favor, the court concluded the failure to have any continuing education
20 courses on handling mentally ill people and the absence of addressing the issue in the
21 police manual creates triable issues whether the defendant’s failure to train amounted to
22 deliberate indifference and was the “moving force” behind the constitutional violations).

23 In Newman, the plaintiff offered a police expert who opined that, given how
24 frequently police officers encounter mentally ill individuals, police officers should be
25 trained on how to handle them. Meanwhile, the record disclosed that the defendant did
26 not provide such training or a police manual policy addressing how to handle mentally ill
27 people. See Newman, 814 F. Supp. 2d at 977. In Kirby, the plaintiff provided data on
28 the relative frequency with which the City’s officers encountered mentally ill individuals,

1 and a police practices expert who observed that law enforcement's response to mental ill
2 people has become an issue of national concern. Kirby, 2013 WL 1497343, at *13.

3 To support the Monell claim, Plaintiff relies on the limited amount of training that
4 Deputy Block and PERT Deputy Norman-Hendersen received in handling mentally ill
5 individuals. No facts are presented as to the frequency with which the deputies interact
6 with mentally ill individuals or whether there are any guidelines to guide deputies in
7 responding to mentally ill individuals. The few facts provided render Plaintiff's
8 argument weak. However, in light of the facts most favorable to Plaintiff and the related
9 caselaw, the Court concludes there are triable issues of material fact whether providing a
10 one-day PERT class, that did not even address how officers should handle incidents
11 involving a mentally ill person, or a three-day PERT class at the police academy, reveal a
12 deliberate indifference to a foreseeable need for additional training.

13 Accordingly, the Court DENIES Defendants' motion to dismiss the Monell cause
14 of action.

15 **D. Third Cause of Action –Battery; Fifth Cause of Action - Negligence and
16 Seventh Cause of Action - Wrongful Death**

17 Defendants conclusorily argue that if the Court finds that Deputy Block did not
18 violate the Fourth Amendment, there is no basis for liability under California law. In a
19 single sentence response, Plaintiff argues that since she demonstrated disputed issues of
20 material fact on the excessive force claim against Deputy Block, Defendants' motion
21 should be denied. Having failed to provide the relevant legal standard for battery,
22 negligence and wrongful death and failing to provide related facts demonstrating the
23 absence of a genuine issue of material fact, the Court DENIES Defendants' motion for
24 summary judgment the third, fifth and seventh causes of action. See Celotex Corp., 477
25 U.S. at 322-23.

26 **E. Fourth Cause of Action – Bane Act, Cal. Civil Code section 52.1**

27 Plaintiff complains that Deputy Block and the County interfered with Gary's
28 constitutional rights to be free from excessive force, and committed violence against

1 Gary when Deputy Block shot him multiple times even though he posed no immediate
2 threat to those present. (Dkt. No. 61, SAC ¶¶ 91-92.)

3 Defendants move for summary judgment on the Bane Act solely arguing that there
4 was no “threat, intimidation or coercion” preceding the alleged Fourth Amendment’s
5 violation of the shooting. They argue that section 52.1 claim requires threat, coercion or
6 intimidation beyond that inherent in the excessive force. Plaintiff argues that Deputy
7 Block interfered with Gary’s Fourth Amendment right to be free from an unreasonable
8 seizure when Deputy Block unreasonably shot and killed Gary.

9 The Bane Act provides a private cause of action against anyone who “interferes by
10 threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or
11 coercion, with the exercise or enjoyment by an individual or individuals of rights secured
12 by the Constitution or laws of the United States, or laws and rights secured by the
13 Constitution or laws of California.” Cal. Civil Code § 52.1(a). A plaintiff must allege
14 “(1) interference with or attempted interference with a state or federal constitutional or
15 legal right, and (2) the interference or attempted interference was by threats, intimidation,
16 or coercion.” Allen v. City of Sacramento, 234 Cal. App. 4th 41, 66-67 (2015) (case
17 involved threatened arrests and threatened confiscation of property and also noting that
18 the case does not involve excessive force).

19 “Some constitutional violations may be serious enough that the coercion inherent
20 in those violations is enough to constitute coercion for the purposes of a Bane Act claim.”
21 Hernandez v. City of San Jose, 241 F. Supp. 3d 959, 983 (N.D. Cal. 2017) (citing
22 Adamson v. City of San Francisco, Case No. 13cv5233-DMR, 2015 WL 5467744, at *2,
23 *9 (N.D. Cal. Sept. 17, 2015) (involving excessive use of force when plaintiff was
24 allegedly “slam[med] . . . to the ground.”)). In Simmons v. Superior Ct., the court of
25 appeal noted that the majority of federal district courts have held “[w]here Fourth
26 Amendment unreasonable seizure or excessive force claims are raised and intentional
27 conduct is at issue, there is no need for a plaintiff to allege a showing of coercion
28 independent from the coercion inherent in the seizure or use of force.” 7 Cal. App. 5th

1 1113, 1126 (2016) (quoting Dillman v. Tuolumne County, No. 1:13-CV-00404-LJO-
2 SKO, 2013 WL 1907379, at *21 (E.D. Cal. May 7, 2013)). This Court has also
3 concluded that when intentional conduct is involved, a plaintiff does not need to provide
4 evidence showing threats, intimidation or coercion separate from a constitutional
5 violation. See Mann v. Cnty. of San Diego, 147 F. Supp. 3d 1066, 1092 (S.D. Cal.
6 2015); Estate of Lopez ex rel. Lopez v. City of San Diego, No. 13cv2240-GPC(MDD),
7 2014 WL 7330874, at *15 (S.D. Cal. Dec. 18, 2014).

8 Here, Plaintiff's Bane Act is based on Deputy Block's alleged excessive use of
9 force. Therefore, contrary to Defendants' argument, Plaintiff does not need to allege a
10 threat, coercion or intimidation separate from the excessive force. See id. Because the
11 Court concludes that there are genuine issues of disputed material fact whether the force
12 used was excessive, it similarly concludes that there are genuine issues of disputed
13 material fact whether the excessive force was by "threats, intimidation or coercion."
14 Accordingly, the Court DENIES Defendants' motion for summary judgment on the
15 fourth cause of action for violation of California Civil Code section 52.1.

16 **F. Sixth Cause of Action - Negligent Hiring, Retention, Supervision as to
17 Defendant Sheriff Gore**

18 Plaintiff claims that Sheriff Gore was negligent in hiring, retaining and supervising
19 the deputies as Deputy Block and other deputies were unfit and/or incompetent to
20 perform their duties and created a particular risk to the public by inadequately dealing
21 with individuals in the midst of a mental health crisis. (Dkt. No. 61, SAC ¶¶ 104-06.)
22 Plaintiff also seeks to impose liability on the County under Government Code section
23 815.2(a). (Dkt. No. 61, SAC ¶ 109.)

24 Defendants claim that Sheriff Gore is not liable for two reasons. First, there is no
25 causal connection to Deputy Block's use of force. Second, a public employee cannot be
26 civilly liable for misconduct of subordinates under California Gov't Code section 820.8
27 which states that "a public employee is not liable for an injury caused by the act or
28 omission of another person." Cal. Gov't Code § 820.0. They also argue that California

1 cases bar negligent hiring and supervision claims against a public entity. In response,
2 Plaintiff argues that Gore, as the Sheriff, may be directly liable for negligence and the
3 County is vicariously liable pursuant to California Gov't Code section 815.2.

4 The California Tort Claims Act ("CTCA") provides the exclusive scope of tort
5 liability for government entities and employees. Cal. Gov't Code § 810, *et seq.* The
6 CTCA abolished common law governmental tort liability. Becerra v. Cnty. of Santa
7 Cruz, 68 Cal. App. 4th 1450, 1457 (1998). Thus, "in absence of some constitutional
8 requirement, public entities may be liable *only* if a statute declares them to be liable." Id.
9 (emphasis in original); see also Cal. Gov't Code § 815; Michael J. v. Los Angeles Cnty.
10 Dept. of Adoptions, 201 Cal. App. 3d 859, 866 (1988) ("Under the Act, governmental
11 tort liability must be based on statute; all common law or judicially declared forms of tort
12 liability, except as may be required by state or federal Constitution, were abolished").

13 Under the CTCA, a public employee is generally "liable for injury caused by his
14 act or omission to the same extent as a private person." Cal. Gov't Code § 820(a).
15 California Government Code section 815.2 "makes a public entity vicariously liable for
16 its employee's negligent acts or omissions within the scope of employment." Eastburn v.
17 Regional Fire Protection Auth., 31 Cal. 4th 1175, 1180 (2003). However, "liability of the
18 employer only attaches if and when it is adjudged that the employee was negligent," and,
19 although "public entities always act through individuals, that does not convert a claim for
20 direct negligence into one based on vicarious liability." Sanders v. City of Fresno, No.
21 Civ. F-05-0469 AWISMS, 2005 WL 2435893, at *9 (E.D. Cal. Sept. 30, 2005);
22 Megargee v. Wittman, 550 F. Supp. 2d 1190, 1210 (E.D. Cal. 2008).

23 There is no statutory basis for direct claims against a public entity for negligent
24 hiring and supervision practices. de Villers v. Cnty. of San Diego, 156 Cal. App. 4th
25 238, 252 (2007) ("We find no relevant case law approving a claim for direct liability
26 based on a public entity's allegedly negligent hiring and supervision practices."). Thus,
27 there can be no direct liability of negligent hiring, retention or supervision against the
28 County.

1 Next, the Court considers whether the County can be vicariously liable for the acts
2 of Sheriff Gore for negligent hiring, and supervision. The County can be vicariously
3 liable only if Sheriff Gore is personally liable for such a claim. deVillers, 156 Cal. App.
4 4th at 249 (“When assessing a claim for vicarious liability against a governmental
5 employer based on the acts or omissions of its employee, a court must examine whether
6 the employee who acted or failed to act would have been personally liable for the
7 injury.”). In support of alleging negligence liability against Sheriff Gore, Plaintiff cites to
8 C.A. v. William S. Hart Union High Sch. Dist., 53 Cal. 4th 861 (2012) where the
9 California Supreme Court held that a supervisory employee may be directly liable when
10 he breaches a duty to supervise and the public employer may be held vicariously liable
11 under section 815.2. Id. at 877. However, a plaintiff must allege a special relationship in
12 order to bring a negligent hiring claim. Id. (“Absent such a special relationship, there can
13 be no individual liability to third parties for negligent hiring, retention or supervision of a
14 fellow employee, and hence no vicarious liability.”); Willis v. City of Sacramento, No.
15 13cv1671-MCE-EFB, 2014 WL 1027070, at *6 (E.D. Cal. Mar. 14, 2014) (dismissing
16 negligent hiring, supervision, and retention claim against sheriff due to plaintiff's failure
17 to allege a special relationship with sheriff). In C.A., the California Supreme Court held
18 that school administrators could be individually liable for their negligence in the hiring,
19 supervision, and retention of a school employee who sexually harassed and abused a
20 student because of the “special relationship” between administrators and their students,
21 which the court compared to that between parents and their children. 53 Cal. 4th at 869.
22 Therefore, the failure of a school administrator to exercise ordinary care in protecting
23 students from harm rendered the school district liable under section 815.2 where the
24 administrator hired an applicant known to have a history of molesting students or where,
25 after hiring an applicant, the administrator learned about the employee's sexual
26 misconduct. Id. at 869-70, 879.

27 In de Villers, where the county toxicologist had poisoned her husband with poison
28 that was taken from the county coroner's office, the court held that there could be no

1 individual liability or vicariously liability by the county for the failure to investigate the
2 toxicologist before hiring her because other employees of the coroner's office had no
3 special relationship with the husband of the homicidal toxicologist; therefore, they had no
4 duty to protect him against his wife. deVillers, 156 Cal. App. 4th at 249.

5 Here, Plaintiff does not allege a special relationship existed between Gary and
6 Sheriff Gore. Therefore, Sheriff Gore cannot be personally liable for a claim of negligent
7 hiring and supervision and consequently, the County cannot be vicariously liable under
8 California Government Code section 815.2. See deVillers, 156 Cal. App. 4th at 249.
9 Accordingly, the Court GRANTS Defendants' motion for summary judgment on the
10 sixth cause of action for negligent hiring, retention, and supervision as to Sheriff Gore
11 and the County.

12 **G. Ninth Cause of Action – Unreasonable Seizure of Cynthia**

13 Plaintiff alleges a claim of unreasonable seizure against Defendants Lieutenant
14 Brown-Lisk, Detective Barnes, Detective Hillen, Sergeant Lopez, Deputy Norie, Deputy
15 Collis and Deputy Worthington. (Dkt. No. 61, SAC ¶ 121.) She claims these defendants
16 locked Cynthia in a patrol car, transported her to the Sheriff's station and held her there
17 for almost seven hours. (Id. ¶ 121.)

18 The Fourth Amendment provides that the “right of the people to be secure in their
19 persons, houses, papers, and effects, against unreasonable searches and seizures, shall not
20 be violated.” U.S. Const. amend. IV. A person is “seized” for Fourth Amendment
21 purposes “only if, in view of all of the circumstances surrounding the incident, a
22 reasonable person [in the subject's position] would have believed that he was not free to
23 leave.” United States v. Mendenhall, 446 U.S. 544, 554 (1980). “Examples of
24 circumstances that might indicate a seizure, even where the person did not attempt to
25 leave, would be the threatening presence of several officers, the display of a weapon by
26 an officer, some physical touching of the person of the citizen, or the use of language or
27 tone of voice indicating that compliance with the officer's request might be compelled.”
28 Id. In Mendenhall, the circumstances did not constitute a seizure where the incident took

1 place in a public place, the federal agents did not wear uniforms or display any weapons,
2 did not summon the plaintiff but approached her and identified themselves as federal
3 agents, requested to see her ID and ticket. Id. at 555. The U.S. Supreme Court has held
4 that lawfully seized individuals do not need to be advised that they are “free to go” before
5 a seizure is recognized as voluntary. Ohio v. Robinette, 519 U.S. 33, 40 (1996).

6 The Ninth Circuit has held that the “detention of witnesses for investigative
7 purposes can be reasonable in certain circumstances.” Maxwell v. Cnty. of San Diego,
8 708 F.3d 1075, 1083 (9th Cir. 2013). To determine the reasonableness of a witness’s
9 detention, courts examine “the gravity of the public concerns served by the seizure, the
10 degree to which the seizure advances the public interest, and the severity of the
11 interference with individual liberty.” Id. (quoting Brown v. Texas, 443 U.S. 47, 51
12 (1979)). The court concluded that the state’s interest in an investigative witness’
13 detention is “relatively low. Id. at 1084 (citing United States v. Ward, 488 F.2d 162, 169
14 (9th Cir. 1973) (en banc)). As such, the detention must be “minimally intrusive.” Id. at
15 1083.

16 In Maxwell, the decedent’s parents alleged that their over-five-hour detention and
17 separation from one another by law enforcement officers violated their Fourth
18 Amendment right to be free from unreasonable seizure. Id. at 1083. They were seized
19 solely because they were witnesses to a crime. Id. The parents were reunited after the
20 investigators finished interviewing the decedent’s mother. Id. at 1081. The Court noted
21 that the Supreme Court “has never endorsed a detention longer than 90 minutes” even in
22 a Terry⁶ stop which involves a suspicion of criminal activity. Id. at 1084. In support of
23 its conclusion, the court also noted there was no allegation that there was probable cause
24 to arrest or reasonable suspicion to detain, the crime had been solved, the detention was
25
26
27

28⁶ Terry v. Ohio, 392 U.S. 1 (1968).

1 not incident to a search, and was not to prevent the destruction of evidence. Id. at 1085-
2 86.

3 Here, Cynthia states that Deputy Norie and another deputy roughly grabbed her
4 arms and escorted her to a marked SUV and placed her in the back seat. (Dkt. No. 75-2,
5 Kendrick Decl. ¶ 18.) The doors could only be unlocked from the outside and she could
6 not roll down the windows. (Id.) She states that Deputies Norie and Collis ignored her
7 request for fresh air and were not even present for much of the time she was in the car.
8 (Id.) It was hot and she felt like she was suffocating and sat in there for about 20 to 30
9 minutes. (Id. ¶¶ 18, 19.) Around 10:08 am, Sergeant Lopez directed Deputy Collis to
10 drive Deputy Norie and Cynthia to the station together. (Dkt. No. 79-2, Ds' Response to
11 P's Add'l Facts, No. 75.) At the Encinitas station, she was placed in an interrogation
12 room that was guarded by Deputy Collis. (Dkt. No. 75-2, Kendrick Decl. ¶¶ 19, 20.)
13 Later, Lieutenant Brown-Lisk directed Deputy Worthington to relieve Deputy Collis and
14 to be with Cynthia until homicide detectives could interview her. (Dkt. No. 75-1,
15 McBride Decl., Ex. J, Brown-Lisk Depo. at 37:1-6.) Detectives Barnes and Hillen arrived
16 around 1:30 p.m. and told her she had to stay for questioning, which lasted for hours.
17 (Dkt. No. 75-2, Kendrick Decl. ¶ 22.) Once the interrogation was complete, Detectives
18 Barnes and Hillen told her she had to remain at the station so she could be photographed
19 by forensic technicians. (Id. ¶ 24.) Cynthia states she never consented to being held in
20 the patrol car, to being transported to the sheriff's station, to being held and interrogated
21 by detectives, and to being held for forensic photographing. (Id. ¶ 26.) Cynthia was
22 detained from 10:08 am to 4:30 p.m. for questioning and photographing her. (Dkt. No.
23 75-1, McBride Decl., Ex. G, Collis Depo. at 33:10-34:1; Dkt. No. 75-2, Kendrick Decl. ¶
24 26.) Her actual interrogation lasted about 2 or 2.5 hours but she was at the station for
25 seven hours. Plaintiff's facts present genuine issues of material fact as to whether the
26 manner and length of her detention constitute an unreasonable seizure. The Court
27 DENIES Defendants' motion for summary judgment on the ninth cause of action.
28

1 **H. Tenth Cause of Action – Unreasonable Search under 42 U.S.C. § 1983**

2 Plaintiff complains of an unreasonable search against Detectives DuGal and Mays.
3 (Dkt. No. 61, SAC ¶¶ 125-29.) She alleges that the search warrant of her residence was
4 overly broad. (Id. ¶ 125.) Detective DuGal instructed Detective Mays to obtain a search
5 warrant despite the fact there was no probable cause to support it and then Mays made
6 several statements in reckless disregard to the truth which the state court judge relied on
7 in issuing the warrant. (Id. ¶ 126.) Moreover, the warrant affidavit and warrant itself are
8 unconstitutionally vague as they lack any reference to what crime was being investigated.
9 (Id. ¶ 127.)

10 In a claim for judicial deception in obtaining a search warrant, a plaintiff “must 1)
11 make a ‘substantial showing’ of deliberate falsehood or reckless disregard for the truth
12 and 2) establish that, but for the dishonesty, the challenged action would not have
13 occurred.” Liston v. Cnty. of Riverside, 120 F.3d 965, 973 (9th Cir. 1997) (citing Hervey
14 v. Estes, 65 F.3d 784, 788-89 (9th Cir. 1995)). (“[M]isstatements resulting from
15 negligence or good faith mistakes will not invalidate an affidavit which on its face
16 establishes probable cause.” Chism v. Washington, 661 F.3d 380 (9th Cir. 2011)
17 (quoting United States v. Smith, 588 F.2d 737, 740 (9th Cir. 1978)).

18 Here, the parties dispute the contents of the search warrant affidavit and search
19 warrant, and Plaintiff’s SSUF references Exhibits 4 & 5 to Deputy Mays’ deposition;
20 however, the search warrant and affidavit are not in the record. Without knowing the
21 contents of these two documents, neither party has met its burden in demonstrating
22 whether summary judgment should be granted or denied. Accordingly, the Court
23 DENIES Defendants’ motion for summary judgment on the tenth cause of action for an
24 unreasonable search under the Fourth Amendment.

25 **I. Qualified Immunity**

26 The ten individual defendants move for summary judgment on all of the § 1983
27 claims based on qualified immunity. Defendant Deputy Block is sued under the first
28 cause of action for excessive force, Defendants Barnes, Brown-Lisk, Collis, Hillen,

1 Lopez, Norie and Worthington are sued in the ninth cause of action of unreasonable
2 seizure of Cynthia, and Deputies Dugall and Mays are sued in the tenth cause of action
3 involving an alleged unlawful search.

4 Government officials who perform discretionary functions generally are entitled to
5 qualified immunity from liability for civil damages “insofar as their conduct does not
6 violate clearly established statutory or constitutional rights of which a reasonable person
7 would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). “Qualified
8 immunity balances two important interests - the need to hold public officials accountable
9 when they exercise power irresponsibly and the need to shield officials from harassment,
10 distraction, and liability when they perform their duties reasonably,” Pearson v. Callahan,
11 555 U.S. 223, 231 (2009), and it protects “all but the plainly incompetent or those who
12 knowingly violate the law,” Malley v. Briggs, 475 U.S. 335, 341 (1986). The United
13 States Supreme Court has presented a two-part analysis for determining qualified
14 immunity claims, which the court may address in any order. Pearson, 555 U.S. at 236.
15 Qualified immunity protects government officials from liability for civil damages “unless
16 a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional
17 right, and (2) that the right was “clearly established” at the time of the challenged
18 conduct.” Ashcroft v. al Kidd, 563 U.S. 731, 735 (2011).

19 When the facts are disputed, in analyzing qualified immunity, the Court assumes
20 “the version of the material facts asserted by the non-moving party” and “draw all
21 reasonable inferences in favor of the non-moving party.” Mattos v. Agarano, 661 F.3d
22 433, 439 (9th Cir. 2011) (citations omitted); Jeffers v. Gomez, 267 F.3d 895, 903 (9th
23 Cir. 2001) (“Where disputed facts exist, however, we can determine whether the denial of
24 qualified immunity was appropriate by assuming that the version of the material facts
25 asserted by the non-moving party is correct.”).

26 Under the first prong, “the court determines whether the facts alleged, construed in
27 the light most favorable to the injured party, establish the violation of a constitutional
28 right.” Dunn v. Castro, 621 F.3d 1196, 1200 (9th Cir. 2010) (citing Saucier v. Katz, 533

1 U.S. 194, 201 (2001). As to the second prong, “the court decides whether the right is
2 clearly established such that a reasonable government official would have known that ‘his
3 conduct was unlawful in the situation he confronted.’” Id. at 1199 (quoting Saucier, 533
4 U.S. at 202).

5 **1. Whether the Facts Alleged Show Deputy Block’s Conduct Violated a
6 Constitutional Right**

7 This position is based upon the facts relied upon by the defense. As discussed
8 above, the Court concluded there are disputed issues of material fact whether Deputy
9 Block violated Gary’s constitutional right to be free from excessive force as well as
10 whether there was an unlawful seizure of Cynthia.

11 However, taking Plaintiff’s facts as true and construing them in the light most
12 favorable to Gary, Deputy Block acted unreasonably and violated Gary’s constitutional
13 right to be free from excessive force. Similarly, as to Cynthia’s unlawful seizure claim,
14 the Deputies acted unreasonably and violated her constitutional right to be free from an
15 unreasonable seizure. Accordingly, the Court turns to the second prong of the qualified
16 immunity analysis.

17 **2. Whether the Right was Clearly Established**

18 Public officials are immune from a section 1983 suit unless they have “violated a
19 statutory or constitutional right that was clearly established at the time of the challenged
20 conduct.” City and Cnty. of San Francisco, 135 S. Ct. 1765, 1774 (2015). Under the
21 second prong, the Court must consider whether the alleged Fourth Amendment violations
22 of excessive force and unreasonable seizure “w[ere] clearly established at the time of the
23 officer’s alleged misconduct.” S.B. v. Cnty. of San Diego, 864 F.3d 1010, 1015 (9th Cir.
24 2017). “[T]he court decides whether the right is clearly established such that a
25 reasonable government official would have known that ‘his conduct was unlawful in the
26 situation he confronted.’” Dunn, 621 F.3d at 1199 (quoting Saucier, 533 U.S. at 202).

27 A clearly established right is one that is “sufficiently clear that every reasonable
28 official would have understood that what he is doing violates that right.” Reichle v.

1 Howards, 566 U.S. 658, 664 (2012) (internal marks omitted). The United States Supreme
2 Court does “not require a case directly on point, but existing precedent must have placed
3 the statutory or constitutional question beyond debate.” Mullenix v. Luna, 136 S. Ct.
4 305, 308 (2010) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). Recently, the
5 Supreme Court reiterated that “‘clearly established law’ should not be defined ‘at a high
6 level of generality.’” White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting Ashcroft, 563
7 U.S. at 742). Instead, “the clearly established law must be ‘particularized’ to the facts of
8 the case.” Id. (concluding that appellate court failed to point to a case where an officer
9 acting under similar circumstances as the officer in question was held to have violated the
10 Fourth Amendment). However, in an “obvious case”, clearly established can be met
11 “without a body of relevant case law.” Maxwell v. Cnty. of San Diego, 708 F.3d 1075,
12 1083 (9th Cir. 2013) (quoting Brousseau v. Haugen, 543 U.S. 194, 199 (2004)).

13 On the second prong, the Court looks at whether the right was clearly established
14 prior to March 27, 2015, the date of the incident, such that a reasonable officer would
15 have known that shooting Gary was unlawful.

16 Defendants argue that, under Fourteenth Amendment precedent, no-clearly
17 established authority holds that it is unreasonable for a uniformed peace officer to shoot a
18 person who is known to have recently threatened to shoot someone, who is armed with a
19 shotgun, and who swings his shotgun in the direction of the officer and takes a shooter
20 stance, while disregarding officer commands to drop the gun. (Dkt. No. 70-1 at 28.)
21 However, this argument relies upon defendants’ view of the evidence and fails to analyze
22 this issue based upon the facts most favorable to the Plaintiff.

23 Plaintiff argues that Deputy Block’s shooting of Gary was obviously unlawful.
24 And even if not an obvious case, Plaintiff asserts that Glenn v. Washington Cnty., 673
25 F.3d 864 (9th Cir. 2011), and Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001)
26 provided Deputy Block with notice that his shooting of Gary was unlawful. The Court
27 concludes that Ninth Circuit law, including George v. Morris, 736 F.3d 829, 838 (9th Cir.
28 2013), provided clearly established law prior to Gary’s shooting that shooting an

1 individual holding a shotgun with his arms outstretched constitutes a Fourth Amendment
2 violation.

3 An individual armed with a deadly weapon does not render the officers' use of
4 force per se reasonable under the Fourth Amendment. See Glenn, 673 F.3d at 872–73;
5 see also Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement
6 officials may not kill suspects who do not pose an immediate threat to their safety or to
7 the safety of others simply because they are armed."). However, "[i]f the person is
8 armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture,
9 or serious verbal threat might create an immediate threat." George v. Morris, 736 F.3d
10 829, 838 (9th Cir. 2013). In George, the Ninth Circuit concluded that "[i]f the deputies
11 indeed shot the sixty-four-year-old decedent without objective provocation while he used
12 his walker, with his gun trained on the ground, then a reasonable jury could determine
13 that they violated the Fourth Amendment." George, 736 F.3d at 839.

14 In Glenn, officers fatally shot a suicidal and intoxicated 18 year old Lukas Glenn in
15 his driveway when he did not comply with orders to put down a pocketknife. Glenn, 673
16 F.3d at 867–69. His mother called 911 after Lukas began damaging household property
17 and threatened to kill himself with a pocketknife. Id. at 866. Initially, the officers shot
18 Lukas with a bean bag gun. Id. at 869. Afterwards, when Lukas took a couple of steps
19 towards his house, officers shot him eight times with their semi-automatic weapons
20 which caused his death. Id. The Ninth Circuit held that in viewing the evidence in the
21 light most favorable to the plaintiff, a jury could conclude that the officers' conduct
22 violated the Fourth Amendment and were not justified in shooting Lukas, who was
23 holding the pocket knife to his neck and did not brandish it at anyone with the bean bag
24 gun. Id. at 868, 873. There was little evidence that Lukas posed an "immediate threat" to
25 anybody. Id. at 874. Although not involving facts particular to this case since Lukas was
26 holding a pocketknife, and not a shotgun, Glenn provided Deputy Block with notice that
27 shooting at an individual that did not pose an "immediate threat" while wielding a
28 pocketknife at his neck was a violation of the Fourth Amendment.

1 Meanwhile, in Deorle, officers were called by Deorle's wife who was concerned
2 about her husband who was drunk, acting out of control and became suicidal. Deorle,
3 272 F.3d at 1276–77. Deorle initially "brandish[ed] a hatchet" and a crossbow and was
4 verbally abusive to officers, threatening to "kick [their] ass" but complied with orders to
5 drop the hatchet and the crossbow. Id. at 1276-77. Later, Deorle began walking at a
6 "steady gait" in an officer's direction while he was unarmed, the officer did not warn
7 Deorle that he would be shot if he physically crossed an undisclosed line or order him to
8 halt. Id. at 1281. The officer shot Deorle with a lead-filled beanbag round when he
9 arrived at a spot the officer had predetermined. Id. at 1275. The shots removed Deorle's
10 eye and lead shot was embedded in his skull. Id. The Ninth Circuit held that the
11 shooting violated Fourth Amendment right to be free from excessive force. Id. at 1284.
12 The Court finds Deorle is distinguishable from the instant case as Deorle involved an
13 unarmed individual as opposed to an armed individual.

14 However, George v. Morris is a case which provided a reasonable law enforcement
15 officer with notice that Deputy Block's actions were constitutionally infirm. 736 F.3d at
16 829. In George, the victim's wife in the early morning hours saw her husband take their
17 truck's keys and retrieve a pistol from the truck. Id. at 832. She called 911exclaiming
18 that her husband had a gun. Id. Deputies arrived at the front door and the wife asked
19 them to be quiet and not to scare her husband and informed them that he was on the back
20 patio with his gun. Id. After setting up a perimeter, the deputies saw the husband open
21 the door to the second-floor balcony. Id. The deputies identified themselves and directed
22 the husband to show his hands. Id. He was holding a gun in his left hand with the barrel
23 pointed down while holding a walker. Id. While the deputies testified that the husband
24 turned east and raised the gun and pointed it directly at the officer causing him to fire, id.
25 at 833 n.4, there was evidence to support the plaintiff's facts that her husband did not turn
26 the gun towards the officers. Id. The Ninth Circuit stated that "[w]hen an individual
27 points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer
28 to respond with deadly force. Id. at 838 (citing Long v. City & Cnty. of Honolulu, 511

1 F.3d 901, 906 (9th Cir. 2007)). However, the court continued that given the plaintiff's
2 version of events, a reasonable trier of fact could conclude that the deputies' use of force
3 was excessive. Id. at 836, 838. George stands for the obvious proposition that an officer
4 is not entitled to use deadly force against an individual who is armed unless the
5 individual makes "a furtive movement, harrowing gesture, or serious verbal threat that
6 might create an immediate threat." Id. at 838.

7 Here, the facts most favorable to Plaintiff reveal that Gary was facing Deputy
8 Block, standing in a cross pose, with his arms outstretched and near parallel with the
9 ground holding a bottle of vodka in his right hand and the barrel of the shotgun in his left
10 hand. Gary did not swing or aim the shotgun towards Block, never had his hand near the
11 trigger of the shotgun, and did not lower his arms from a parallel position before Deputy
12 Block began shooting. Accepting these facts as true, Gary did not make a furtive
13 movement or harrowing gesture, and did not otherwise engage in conduct that might
14 create an immediate threat. Under George, it was clearly established that shooting Gary
15 with his arms outstretched and parallel to the ground with a shotgun in one hand and a
16 liquor bottle in the other hand, without any further movements or gestures, was a
17 violation of Gary's Fourth Amendment rights to be free from excessive force.

18 Next, Defendants Barnes, Brown-Lisk, Collis, Hillen, Lopez, Norie and
19 Worthington are sued in the ninth cause of action for the unreasonable seizure of Cynthia.
20 On this claim, the Court looks at whether it was clearly established prior to March 27,
21 2015, the date of the incident, that Defendants Barnes, Brown-Lisk, Collis, Hillen, Lopez,
22 Norie and Worthington had notice that their conduct was unlawful.

23 As discussed above, in Maxwell, the Ninth Circuit held in 2013 that it was clearly
24 established and the officers were on notice that "they could not detain, separate, and
25 interrogate the [plaintiffs] for hours" especially in a case where there was no probable
26 cause or reasonable suspicion of crime, it was not a detention incident to a search and not
27 to prevent the destruction of evidence. Id. at 1084-85. Similarly, in this case, Cynthia, a
28 witness to the shooting death of her husband, was detained, locked in a patrol vehicle

1 without the ability to leave, transported to the Sheriff's station, interrogated for over two
2 hours, and remained at the station for seven hours. The shooting of Gary had already
3 occurred and there was no crime to solve, the detention was not incident to a search and
4 there was no threat of destruction of evidence. Taking Cynthia's fact as true, the Court
5 concludes that Defendants Barnes, Brown-Lisk, Collis, Hillen, Lopez, Norie and
6 Worthington were on notice that they could not "detain, separate, and interrogate"
7 Cynthia for hours. See Maxwell, 708 F.3d at 1084-85.

8 Next, as to the unlawful search claim against Deputies May and DuGal, as
9 discussed above, the Court is without sufficient evidence to make a determination and
10 declines to determine whether it was clearly established that they violated Cynthia's right
11 to be free from an unreasonable search.

12 **J. Evidentiary Objections**

13 In their reply, Defendants filed objections to Cynthia Kendrick's declaration as
14 they are contradictory to the account she gave in her audio-recorded interview. They
15 contend that during her interview, she stated that Gary held the shotgun in his right hand
16 and a vodka bottle in his left hand and that he threw the shotgun down before he was shot
17 but then stated she was not certain and may have thrown down the vodka bottle.
18 However, her declaration states that the shotgun was in Gary's left hand and the bottle
19 was in his right hand. They note that even her declaration contains an inconsistent
20 statement as to which hand Gary was holding the shotgun.

21 A court may disregard facts in a declaration filed in a motion for summary
22 judgment if they are "blatantly contradicted" by the record, "so that no reasonable jury
23 could believe it." Scott v. Harris, 550 U.S. 372, 380 (2007) (plaintiff's facts were clearly
24 contradicted by the videotape of the incident); Brown v. Cnty. of San Bernardino, 250 F.
25 Supp. 3d 568, 587 (C.D. Cal. 2017) (disregarding Plaintiff's evidence as it was "blatantly
26 contradicted" by the audio recordings).

27 Here, statements made by Cynthia during the interview do not blatantly contradict
28 the facts in her declaration. In fact, her declaration, itself, contains an inherent

1 discrepancy. In one paragraph, she states the shot gun was in Gary's left hand and liquor
2 bottle was in the right hand, (Dkt. No. 75-2, Kendrick Decl. ¶ 13), and in another
3 paragraph, she states the reverse. (Id. ¶ 8.) Paragraph 8 of her declaration is consistent
4 with her interview statement. The audio-recording of the interview reveals a very
5 distraught and hysterical Cynthia and she may have been confused as to which hand Gary
6 was holding the shotgun. During the interview, he stated that the shotgun was in his right
7 hand and the vodka bottle was in his left hand. (Dkt. No. 70-7, Ds' NOL, Ex. D, Audio
8 Recording Tr. at 37:16-22.) Cynthia's interview statements are not necessarily blatantly
9 contradicted by the audio-recording. A resolution of this disputed fact is one for the trier of
10 fact.

11 Defendants, in their reply, for the first time object to the expert reports of David E.
12 Balash, Alan A Abrams, and Scott A DeFoe offered in support of Plaintiff's opposition
13 and conduct a Daubert⁷ analysis. Typically, the Court will not consider an argument
14 raised for the first time in the reply. Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)
15 (noting that district courts need not consider arguments raised for the first time in a reply
16 brief).

17 However, in ruling there are disputed issues of material facts, the Court did not
18 consider Plaintiff's expert reports and were not necessary for the Court's ruling.
19 Accordingly, the Court OVERRULES Defendants' evidentiary objections.

20 **Conclusion**

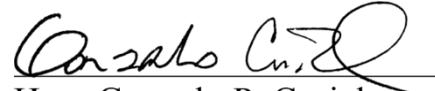
21 Based on the above, the Court GRANTS in part and DENIES in part Defendants'
22 motion for summary judgment. Specifically, the Court GRANTS Defendants' motion for
23 summary judgment the eighth cause of action as unopposed, GRANTS Defendants'
24 motion on the first cause of action for excessive force as to the County, GRANTS
25 Defendants' motion for summary judgment on the sixth cause of action for negligent

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27
28 ⁷ Daubert v. Merrell Dow Pharmas. Inc., 509 U.S. 579 (1993).

1 hiring, retention, and supervision, and DENIES Defendants' motion on all remaining
2 causes of action. The Court **VACATES** the hearing set on March 16, 2018.

3 IT IS SO ORDERED.

4 Dated: March 14, 2018



5 Hon. Gonzalo P. Curiel
6 United States District Judge

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